

Federal Court



Cour fédérale

Date: 20150305

Docket: IMM-1-14

Citation: 2015 FC 281

Ottawa, Ontario, March 5, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**AURORA RAFAEL AGUIRRE
JESSICA RASGADO RAFAEL
(A.K.A. JESSICA ISABEL RASGADO
RAFAEL)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicants, a mother and her eldest daughter, seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) made on December 9, 2013, which determined that they were not Convention refugees pursuant to section 96, nor persons in need of protection pursuant to section 97 of the Act.

Overview

[2] This application for judicial review raises the issue of how the Board should proceed when faced with the unfortunate circumstances of an applicant who is unable to participate in the determination of their claim due to a debilitating condition that arose after the claim was made.

[3] The applicants are citizens of Mexico and claim a risk of persecution from the Mara 18 arising from an incident in 1997 and from the principal applicant's former common law spouse. The principal applicant, Ms. Aguirre, suffered a debilitating stroke in 2010, before the Board finally determined the applicants' claim.

[4] The applicants argue that the Board breached its duty of procedural fairness by proceeding with the determination of their claim despite these circumstances and by failing to alert the applicants that the state protection analysis would presume that Ms. Aguirre would be in the care of a hospital and that her daughter, Jessica, would be in the care of a child services agency in Mexico.

[5] The applicants also argue that the Board's decision is unreasonable because the Board failed to consider the available evidence of risk, particularly from the applicant's former common law spouse, and because the Board fettered its discretion.

[6] Although I am sympathetic to the very unfortunate circumstances of the applicants, the decision is neither procedurally unfair nor unreasonable.

[7] The Board recognized the applicants' circumstances and endeavoured to ensure that the applicants had a full opportunity, given their circumstances, to gather additional evidence and to participate through their designated representative. The Board considered all the evidence and concluded that the applicants had not established a well-founded fear of persecution from either the Mara 18 or from Ms. Aguirre's former common law husband. This was the determinative finding.

[8] The state protection findings are based on the Board's view that Ms. Aguirre, if returned to Mexico, would be placed in a medical facility and her daughter Jessica would be placed with a child care organization and that those organizations would provide adequate protection or would engage state protection. That is a reasonable approach given that Ms. Aguirre's prognosis is that she will continue to require such care. The applicants' designated representative was invited to make additional written submissions on state protection and provided brief submissions.

[9] The Board did not fetter its discretion. The Board's decision and the record confirm that it carefully considered whether it could move forward with the determination of the claim due to the challenges for the applicants who could not provide additional evidence. The Board concluded that it could proceed with the participation of the designated representative and the evidence on the record and not because of any directive of the Coordinating Board Member.

[10] Despite what appears to be a result lacking compassion, the Court cannot create a way to find that the Board's decision is either unreasonable or not correct in order to ask the Board to reconsider the application for refugee protection or to hold it in abeyance. The Board's role was

to determine whether the applicants were refugees pursuant to sections 96 and 97 of the Act based on the claim they had made in 2007 and updated in 2008, and it did so. No error can be found in the Board's process or its decision.

[11] As the Board noted, the applicants' unfortunate circumstances may be raised in other applications which had apparently been discussed informally but which were not before the Board and were beyond its jurisdiction.

Background

[12] Ms. Aguirre's Personal Information Form (PIF) indicates that in 1997-98, she was a member of a volleyball team that was attacked by Mara 18 gang members. The police escorted the gang members out of the area after the attack, however, gang members threatened members of the volleyball team that they would pay for what had happened. One of the team members and her family were attacked in their home. Ms. Aguirre's stand at the local market was destroyed the following week. She stated that some team members paid the gang to avoid harm. She could not afford to do so and hid at her sister's home until 2001 while her sister was in the United States (US).

[13] In 2001, Ms. Aguirre went to the US leaving her two year old daughter, Jessica, in the care of Jessica's grandparents. Jessica joined Ms. Aguirre in the US in 2006. While in the US, Ms. Aguirre was in a common law relationship with Fernando Cisneros Gonzalez, also a citizen of Mexico. Ms. Aguirre, Jessica and Mr. Gonzalez arrived in Canada in 2007 and claimed refugee protection. Ms. Aguirre then gave birth to a second daughter in Canada in 2008.

[14] Ms. Aguirre and Jessica's refugee claims were separated from Mr. Gonzalez's claim following allegations of domestic abuse. Mr. Gonzalez returned to Mexico. Ms. Aguirre then amended her claim for protection to add the risk from Mr. Gonzalez, should she return to Mexico.

[15] The Board's first hearing, scheduled for February 2009, was adjourned to seek information about or confirmation of consent from Jessica's biological father in Mexico for her claim for protection in Canada.

[16] In March 2010, Ms. Aguirre married Simeon Sanchez, a Canadian citizen.

[17] In June 2010, shortly before her refugee protection hearing was scheduled to resume, Ms. Aguirre suffered a debilitating stroke. She remained in a coma for a long period of time, including at the time of the hearing, and now remains disabled and resides in a long term medical facility in Windsor, Ontario. The two children remain in the care of Mr. Sanchez. Ms. Aguirre has been unable to participate in the determination of her claim since her stroke.

[18] In 2012, due to Ms. Aguirre's condition, a designated representative was appointed to represent both her and Jessica. The Board adjourned the hearing several times to permit the designated representative to gather evidence.

[19] The Board ultimately proceeded with the hearing on July 11, 2013 with the participation of the designated representative, Jessica and counsel for the applicants. Jessica did not have any

information about events in Mexico or the threats from Mr. Gonzalez. Counsel for the applicants noted that he had been unable to get any instructions or gather updated information from Ms. Aguirre given her medical condition and reiterated his concern that the hearing should not proceed. The Board acknowledged the circumstances and invited counsel to make additional written submissions on the two bases for the applicants' claims and on state protection.

The decision under review

[20] Although the Board noted that there was no nexus between the applicant's fear of the Mara 18 because the encounter with the gang was a crime and the motive for any subsequent threats was a vendetta, the Board considered both claims; the risk from the Mara 18 and the risk of domestic violence from Mr. Gonzalez under both sections 96 and 97.

[21] The Board addressed the submissions of counsel that the hearing should not proceed because Ms. Aguirre could not testify and that the designated representative and counsel could not obtain evidence regarding her current risks or fear in Mexico. The Board acknowledged the circumstances, but noted that the Board had provided "due recourse" regarding hearing their claim fairly; a designated representative was appointed, the applicants were represented by counsel, the hearing was postponed to provide time to gather evidence, and the Board exercised extreme care and due diligence in proceeding with the claims. The Board also noted that the onus remained on the applicants to advance their claims.

[22] The Board noted that it considered all the evidence, as well as Ms. Aguirre's particular circumstances. The determinative issue was whether the applicants' fear upon return to Mexico

was objectively well-founded. The Board found that, on the balance of probabilities, the applicants would not be pursued or harmed by the Mara 18 because more than fifteen years had passed since the incident described by Ms. Aguirre in her PIF. The Board also found that there was insufficient reliable and trustworthy probative evidence to establish that Mr. Gonzalez would be looking for the applicants or would harm them upon their return to Mexico. With respect to both risks, the Board noted that Ms. Aguirre would, on a balance of probabilities, be placed in a medical facility and that Jessica would be placed in the custody of a child care organization and their welfare would be the responsibility of Mexico.

[23] The Board then concluded that there was no serious possibility that the claimants would face persecution upon return to Mexico, nor would they be subjected, on a balance of probabilities, to a risk to life or to a risk of cruel and unusual treatment or punishment by either Mr. Gonzalez, the former common law spouse, or by the Mara 18. In other words, there was no risk pursuant to either section 96 or section 97.

[24] The Board then went on to consider whether the applicants would, on a balance of probabilities, receive adequate state protection. This appears to be an additional or alternative assessment, given that the Board found there was no well-founded risk.

[25] The Board again noted that Ms. Aguirre remained in a coma and would, on a balance of probabilities, be placed in a medical facility in Mexico, noting that as a citizen of Mexico, the responsibility for her welfare would rest upon Mexico. The Board then found that, on a balance of probabilities, she would receive adequate state protection.

[26] The Board also noted that Jessica would be placed in a child care organization in Mexico, because her mother could not care for her. Again, as she is a citizen of Mexico, the responsibility for her welfare lies with Mexico. The Board then found, on a balance of probabilities, she would receive adequate state protection.

[27] The Board acknowledged that the applicants faced difficult personal circumstances but, based on the totality of the evidence, reiterated that there was no serious possibility that they would be persecuted, or that, on a balance of probabilities, they would be subjected personally to a risk to life or to a risk of cruel and unusual treatment or punishment, or to a danger of torture upon their return to Mexico today.

[28] The Board added that the applicants' situation "may be compelling from a Humanitarian and Compassionate perspective" but noted that it had no jurisdiction to consider these grounds.

The Issues

[29] The applicants argue that the Board breached its duty of procedural fairness and that the decision was not reasonable. More specifically, the applicants identify four issues:

1. Whether the Board breached its duty of procedural fairness by proceeding with the hearing despite the fact that the principal applicant could not participate and provide evidence on the risks she faced;
2. Whether the Board breached its duty of procedural fairness by not advising the applicants that the Board would base its state protection analysis on the assumption that Ms. Aguirre would be placed in a medical facility and that Jessica

would be placed in a child care organization and by not requesting submissions on this issue;

3. Whether the Board reasonably assessed the risks, given that there was no ability for Ms. Aguirre or Jessica to provide updated evidence; and,
4. Whether the Board fettered its discretion by proceeding with the hearing.

Standard of review

[30] There is no dispute that issues of procedural fairness are reviewed on the standard of correctness and no deference is owed (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 [*Khosa*]; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, [2006] 3 FCR 392).

[31] The respondent points out that where allegations of a breach of procedural fairness are made, the scope of the duty must be considered (*Re Sound v Fitness Industry Council of Canada and Goodlife Fitness Centres Inc*, 2014 FCA 48 at paras 34-42, 120 CPR (4th) 287). However, this does not impact the standard of review per se, but the assessment of the scope of the duty and whether there has been a breach of the duty owed.

[32] Questions of fact and of mixed law and fact are reviewed on the standard of reasonableness.

[33] It is well settled that where the standard of reasonableness applies, the role of the Court is to determine whether the Board's decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (Dunsmuir, at para 47). There

might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome” (*Khosa*, at para 59). The Court cannot re-weigh the evidence or remake the decision.

[34] A reasonable decision is one that can stand up to a somewhat probing examination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 63, [1999] SCJ No 39).

[35] Allegations of fettered discretion are not stand alone grounds. A decision that is the result of fettered discretion is per se unreasonable (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 20-24, 341 DLR (4th) 710).

Did the Board breach its duty of procedural fairness?

The applicants’ submissions

[36] The applicants submit that the fundamental issue is the breach of procedural fairness which resulted from the Board proceeding with the hearing and determining the applicants’ claim for refugee protection despite the fact that, as a result of Ms. Aguirre’s stroke, she could not instruct counsel and could not participate in any way to provide up to date evidence of the risk she and Jessica would face upon return to Mexico, or their fear.

[37] The applicants acknowledge that the onus is usually on an applicant to establish their well-founded fear of persecution. In this case, however, the applicants were severely prejudiced

in meeting this onus. The previous postponements of their hearing did not overcome this prejudice.

[38] The applicants submit that guidelines and rules which encourage the expeditious determination of refugee claims must be balanced against the prejudice to the applicants of proceeding in circumstances where they cannot participate and present all of their evidence to support their claim.

[39] The applicants argue that the Board should have continued to postpone the hearing, leaving their claim for refugee protection in abeyance.

[40] The applicants add that the appointment of a designated representative did not overcome the prejudice to the applicants because the designated representative was unable to gather additional evidence from Ms. Aguirre's family in Mexico about potential ongoing risks from the Mara 18 due to the rare dialect spoken by the family. The designated representative also could not gather evidence of the ongoing risk from Mr. Gonzalez due to the inability of Ms. Aguirre to communicate and due to Jessica's lack of knowledge about this risk.

[41] The applicants further submit that the Board breached its duty of procedural fairness by not alerting them that it would consider the issue of state protection on the basis that Ms. Aguirre would be placed in a medical facility and Jessica in the custody of a childcare organization. The applicants did not have an opportunity to make submissions on this approach and the Board did not refer to any evidence to support its conclusion.

The respondent's submissions

[42] The respondent submits that the Board was not obliged to postpone the hearing indefinitely. The Board had postponed the hearing several times and took appropriate steps to accommodate the applicants, including appointing a designated representative. The respondent notes a lack of any jurisprudence that supports the applicants' view that the Board could postpone the determination of their refugee claim indefinitely.

[43] The respondent submits that the Board considered all the available evidence including what had been available prior to the applicant's stroke in 2010; the PIF, the amended PIF, and the police report regarding the allegations of domestic violence against Mr. Gonzalez. The respondent notes that the applicants had ample opportunity to gather additional evidence since 2010 and were represented by counsel at all times. The designated representative was appointed over a year before the hearing was held in 2013.

[44] The respondent submits that the Board's assumption that Ms. Aguirre would be in a medical facility and that Jessica would be in the custody of a child care organization upon return to Mexico was reasonable based on the present circumstances. In addition, the applicants were invited to make submissions on state protection, taking into account the applicants' circumstances and, in particular, Ms. Aguirre's medical condition. Although the onus remained on the applicants to rebut the presumption of adequate state protection, their submissions to the Board were very brief.

[45] The respondent adds that state protection was not the determinative finding; rather, the Board found that the applicants did not have a well-founded fear of persecution under section 96, nor did they face a risk under section 97.

There was no breach of procedural fairness

[46] The Board's determination of the applicants' claim for refugee protection without the participation of Ms. Aguirre does not constitute a breach of procedural fairness.

[47] The applicants' claim was first made in 2007 and updated in 2008 prior to Ms. Aguirre's stroke. Despite the unfortunate intervening event, their application for refugee protection required the Board to make a determination. The Board carefully considered the challenges faced by the applicants. As early as October 2011, the Board indicated that an indefinite postponement was not an option and raised the need to appoint a designated representative.

[48] Although the Board's own guidelines encourage an expeditious determination of refugee claims the same guidelines note the need for fairness. In this case, the Board took all reasonable steps to permit the applicants to present their case; the applicants were represented by counsel, a designated representative was appointed, and postponements were granted several times including to permit the designated representative to seek further updated information. The transcript of the hearings indicates that the Board, the designated representative, and counsel for the applicants discussed the manner in which the Board would proceed in the absence of Ms. Aguirre.

[49] The Act and the *Refugee Protection Division Rules*, SOR/2012-256 [the Rules], both address the role of a designated representative.

[50] Subsection 167 (2) of the Act provides that:

If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.
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[51] The Rules set out the requirements to be a designated representative and the responsibilities involved.

[52] Rule 20(10) provides:

20(10) The responsibilities of a designated representative include	20(10)Les responsabilités d'un représentant désigné sont notamment les suivantes :
(a) deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel;	a) décider s'il y a lieu de retenir les services d'un conseil et, le cas échéant, donner à celui-ci des directives, ou aider la personne représentée à lui donner des directives;
(b) making decisions regarding the claim or application or assisting the represented person in making those decisions;	b) prendre des décisions concernant la demande d'asile ou toute autre demande ou aider la personne représentée à prendre de telles décisions;
(c) informing the	c) informer la personne

represented person about the various stages and procedures in the processing of their case;	représentée des diverses étapes et procédures dans le traitement de son cas;
(d) assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing;	d) aider la personne représentée à réunir et à transmettre les éléments de preuve à l'appui de son cas et, au besoin, témoigner à l'audience;
(e) protecting the interests of the represented person and putting forward the best possible case to the Division;	e) protéger les intérêts de la personne représentée et présenter les meilleurs arguments possibles à l'appui de son cas devant la Section;
(f) informing and consulting the represented person to the extent possible when making decisions about the case; and	f) informer et consulter, dans la mesure du possible, la personne représentée lorsqu'il prend des décisions relativement à l'affaire;
(g) filing and perfecting an appeal to the Refugee Appeal Division, if required.	g) interjeter et mettre en état un appel devant la Section d'appel des réfugiés, si nécessaire.

[53] The designated representative acts in the place of the applicant where the applicant is not able to do so due to age or incapacity. The agreement with the applicants' designated representative reflected the responsibilities as set out above.

[54] Although the designated representative and counsel for the applicants were not able to gather any updated evidence with respect to the risk from the Mara 18 today or the risk from Mr. Gonzalez, the Board had evidence of the applicants' claimed risks. Together with the other

evidence available and the submissions of the designated representative, the Board proceeded to determine the claim.

[55] To find that a hearing could not proceed solely due to the inability of the principal applicant to participate, although a designated representative had been appointed, would ignore the purpose of the appointment of the designated representative, who is the surrogate for the applicant.

[56] As the respondent noted, no authority was cited to support the argument that the Board could postpone the determination of the claim indefinitely. There does not appear to be any such provision in the Act or in the Rules. The transcript reveals that discussions had taken place between the applicants' designated representative and the Board about other options and if those options had been pursued, the claim for refugee protection could possibly have been withdrawn. That did not occur, however, and the Board proceeded.

[57] The Board did not breach its duty of procedural fairness by not specifically asking the applicants to make submissions on state protection based on the premise that Ms. Aguirre would be placed in a medical facility in Mexico and that Jessica would be placed with a child care organization. The Board was quite specific in asking for submissions based on the applicants' circumstances and Ms. Aguirre's medical condition. This was sufficient to alert the applicants to the nature of submissions sought. The onus remained on the applicants to support their claim, which included the onus to rebut the presumption of adequate state protection. This is related to

both their well-founded fear and the ability of the state to protect them against any well-founded fear or risk.

[58] In addition, the determinative issue for the Board was that the applicants did not have a well-founded fear of persecution and not the failure of the applicants to rebut the presumption of state protection.

Did the Board fetter its discretion?

The applicants' submissions

[59] The applicants submit that the Board fettered its discretion by proceeding with the hearing on the direction of the Coordinating Board Member to do so, despite previously acknowledging that the Board could not assess the applicants' credibility and despite Ms. Aguirre's continuing inability to participate.

[60] In other words, the applicants submit that the board failed to fully consider whether it should or could proceed with the hearing in the circumstances and instead acted on the direction of the Coordinating Board Member who determined that the hearing must proceed and that it could not be postponed indefinitely.

[61] The applicants note that their counsel and designated representative had raised the need to postpone the hearing with the Board on several occasions due to the impossibility of Ms. Aguirre to participate and the challenges in gathering updated information, including at the 2012 hearing before the Board, which was then postponed.

[62] Counsel for the applicants made a subsequent request to the Board on April 8, 2013 to postpone the hearing, and noted that counsel and the designated representative had advised the Board of the objection to proceeding because no updated evidence was available. That request claims that the Board member previously stated that she could not proceed with a hearing because there was no evidence on which she could make credibility findings or findings with respect to their ability to seek state protection.

The respondent's submissions

[63] The respondent explains that fettering discretion is defined as treating a single factor as conclusive without the need to consider other factors, applying a discretionary power as a hard and fast rule without regard to context, or allowing his or her discretion to be bound by the finding of another (Brown and Evans, *Judicial Review of Administrative Action in Canada* (loose leaf) at 12:4410; David Mullan, *Administrative Law* (5th Ed), pp 951-953). This does not include statements made by the Board on the limits of its ability to assess certain factors in the absence of evidence.

[64] The respondent notes that the applicants based their allegation of fettered discretion on the April 4, 2013 response by the Board to the request by counsel for an indefinite postponement. The April 8, 2013 response from the responsible Board member communicated the views of the Coordinating Board Member. The response noted that the case should be scheduled as soon as possible with the assistance of counsel and the designated representative and that the decision should be made on the evidence before the Board.

[65] The respondent also notes the subsequent request for a postponement (for the same reasons) and the Board's response dated April 9, 2013 which states "the Member will deal with the issues raised by counsel at the hearing". The respondent also points to the transcript of the hearing and the decision of the Board and submits that both demonstrate that the Board did not fetter its discretion, but rather that the Board fully appreciated that it had to consider whether or not to proceed and after such consideration, it decided to proceed.

The Board did not fetter its discretion

[66] The Board recognized the challenging circumstances of proceeding without Ms. Aguirre, but noted that: Ms. Aguirre's condition would not improve; the applicants had been represented by counsel from the beginning of their claim; the applicants' designated representative could proceed; there was evidence on the record, including the evidence Ms. Aguirre provided before her stroke; time had been given to gather additional evidence which did not prove to be fruitful; and, the basis for the claim could be assessed on the evidence available.

[67] I do not agree that the Board proceeded with the hearing on the direction or instruction of the Coordinating Board Member or in contradiction with a previously expressed concern. The subsequent correspondence and the transcript confirm this.

[68] The record includes several letters from counsel for the applicants noting the need for postponements. The Board granted several postponements. As early as October 2010, the Board indicated that the hearing would not be postponed indefinitely. In October 2011, the Board's notes indicate that the option of appointing a designated representative was raised with counsel.

The Board permitted another postponement in early 2012 at the request of counsel and gave counsel until the end of March 2012 to find a designated representative for Ms. Aguirre. The Board arranged to have a designated representative appointed for Jessica. Ultimately, the same designated representative acted for both. Subsequently, additional time was provided to permit the designated representative and counsel to seek further evidence.

[69] In response to the request from counsel on March, 26, 2013 that the hearing not be scheduled because Ms. Aguirre could not provide any information about risk, state protection or a possible Internal Flight Alternative in Mexico, the Coordinating Board Member noted the chronology, that the medical evidence suggested that Ms. Aguirre's condition would not improve, that a designated representative had been appointed and then concluded that the case could not be postponed indefinitely. This response was communicated to counsel for the applicants. On April 8, 2013, counsel reiterated the request that the hearing not be held, noting that the Board had previously expressed the view that it could not proceed because there was no evidence upon which the Board could make a credibility finding. The Coordinating Board Member then responded on April 12, 2013 indicating that the presiding Board member would deal with counsel's submissions at the hearing and noting that the designated representative would represent the applicants.

[70] Although counsel for the applicant, in his letter dated March 26, 2013 states that he explained to the Board that "there is no possibility of assessing credibility, ability to approach the state for protection and other required issues due to the claimant's particular medical situation", I have not located anything in the record that confirms that the Board member expressed an

inability to determine the claim on this basis. Counsel also states in his April, 8, 2013 letter that the “Board member seized with this case has already stated on the record that she cannot proceed with a hearing because there is no evidence on which she can make credibility findings . . .”

Again, I do not see such a statement on the record.

[71] At the 2009 hearing, Ms. Aguirre was in attendance and the hearing was adjourned to gather information about the consent of Jessica’s father.

[72] At the November 2012 hearing, the Board acknowledged that Ms. Aguirre had had a stroke and noted her prognosis and that a designated representative had been appointed and was in attendance on behalf of the applicants. The Board Member also noted that a pre-hearing conference had been held to consider how to proceed given that Ms. Aguirre was unable to testify in any manner. There is nothing in the transcript that suggests the Board Member expressed any inability to proceed.

[73] The transcript of the hearing held on July 11, 2013 reveals that there were discussions about proceeding with the hearing although Ms. Aguirre remained in the hospital and that there was no change in her condition. The Board member recapped discussions that had taken place off the record and then summarized the risks that the applicants had asserted. The Board noted that neither Jessica nor Ms. Aguirre’s current husband had any information about their problems in Canada or in Mexico. The Board confirmed with Counsel the evidence on the record, which had been set out in the PIF narrative, regarding the risk from the Mara 18 and that nothing more had been added.

[74] The Board then specifically asked counsel for written submissions on the risk from Mr. Gonzalez, “if he were to approach the principal claimant or Jessica upon return to Mexico”. The Board asked for submissions on state protection and “whether it is reasonable to expect these claimants to approach the authorities to obtain state protection for themselves in their particular situation and circumstances . . .”

[75] The Board added, “And then also considering the principal applicant’s current medical condition, and considering that the associated claimant is a minor claimant. And that is what you are going to focus on in your submissions.”

[76] The decision of the Board at paragraphs 24-25 squarely addresses this issue. The Board acknowledged the submissions of counsel that Ms. Aguirre was unable to provide instructions or assist counsel with respect to her current fears. The Board then stated that it disagreed with counsel’s submission that the Board had erred in requiring the hearing to proceed. The Board noted the measures it had taken to address the circumstances of the applicants, including the appointment of a designated representative, that the applicants had been represented all along by competent counsel, and that additional time had been given to gather evidence to support their claim.

[77] The Board clearly turned its mind to whether it could proceed in these circumstances and found that it could. Even if the Board had previously expressed any concerns about the inability to assess credibility or hear submissions on state protection (and I am not satisfied that it did given that I could not find such a reference on the record) the Board did not fetter its discretion.

The Board fully considered whether it could move forward. It was not guided by a goal to be expeditious or due to the direction of the Coordinating Board Member nor did it contradict the earlier reservation as suggested by the applicants. I also note that the Board did not make any credibility findings.

Is the decision reasonable?

The applicants' submissions

[78] The applicants submit that the Board failed to reasonably assess the risks given that there was no ability for Ms. Aguirre to provide updated evidence due to her inability to participate and communicate and given that Jessica could not provide evidence because she was unable to communicate with family members in Mexico and had no first hand knowledge of the risk in Mexico or from Mr. Gonzalez.

[79] The applicants submit that the determination that they did not have a well-founded fear of persecution was not reasonable because the Board did not assess the risks from the Mara 18 or Mr. Gonzalez. In addition, the Board did not reasonably assess the adequacy of state protection given that the applicants would be incapable of assessing state protection if they needed to do so upon return to Mexico.

[80] Although 15 years had passed since the threat from the Mara 18, the applicants had no ability to gather updated information and advise whether the Mara 18 remained a threat to them upon their return. The designated representative could not obtain any information from

Ms. Aguirre's family in Mexico because of the dialect they spoke. The applicants argue it was impossible for the Board to conclude that there was no prospective risk.

[81] With respect to the risk from Mr. Gonzalez, the applicants submit that the statement of Ms. Aguirre to the police in 2008 indicated that he had pushed her on that occasion, but she feared what he may do in the future, and that he had made threats of violence in the past. The applicants submit that although Mr. Gonzalez had returned to Mexico, the Board failed to consider the risk he could pose to the applicants given that the younger daughter, a Canadian citizen, was his child and could return to Mexico with her mother and sister, providing the possibility for contact with Mr. Gonzalez and exposing them to risk from him.

[82] With respect to state protection, the applicants note that their submissions to the Board stated that Ms. Aguirre was completely unable to protect herself or Jessica from her former common law spouse and that they were completely defenceless. In addition, they submitted that domestic violence is rampant in Mexico and the laws against domestic violence are rarely enforced.

[83] The applicants argue, as noted above, that although the Board asked for written submissions on state protection, the Board did not clearly indicate that it was contemplating state protection based on Ms. Aguirre being placed in a medical facility and Jessica in a child care organization. The applicants further submit that where the risk is from violence, the police are the responsible agency, not a health or child care facility.

[84] The applicants also argue that the Board considered irrelevant factors in reaching its determination, including that the applicants could make a humanitarian and compassionate (H&C) application and that Mr. Sanchez planned to submit a spousal sponsorship application for Ms. Aguirre.

The respondent's submissions

[85] The respondent submits that the Board assessed the evidence of the risk posed by the Mara 18 and the risk posed by Mr. Gonzalez and that its determinative finding was that there was no objectively well-founded fear of persecution. This finding could reasonably be made based on the evidence.

[86] The incident with the Mara 18 occurred over 15 years ago. No evidence was provided of a more recent or ongoing threat. The respondent acknowledged the challenges of gathering the evidence from family in Mexico, but notes that Ms. Aguirre should have gathered all the evidence to support her claim made in 2007 and 2008, which would have been available prior to the hearing that was to commence in 2010. There was nothing more on the record regarding that risk other than the applicants' PIFs and notes from Citizenship and Immigration Canada (CIC), which the Board acknowledged.

[87] With respect to the risk from Mr. Gonzalez, the Board clearly acknowledged that if the applicants returned to Mexico and the youngest daughter returned with them, Mr. Gonzalez may take an interest in his child. The Board also considered the evidence on the record regarding the allegations of domestic violence including the police report, peace bond, witness statement from

Ms. Aguirre, and witness statement from Jessica, which was consistent with her evidence provided to the Board five years later.

[88] The respondent also submits that the Board did not err by referring to a possible sponsorship claim or an H&C application. These were not determinative of the decision, they were simply mentioned (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at paras 9-10, 277 DLR (4th) 762; *Maksini v Canada (Minister of Citizenship and Immigration)*, 2008 FC 826 at para 13, 168 ACWS (3d) 1042; *Isa v Canada (Secretary of State)*, (16 February) Doc No IMM-1760-94 (FCTD)).

The Board's decision was reasonable

[89] Despite the unfortunate circumstances of the applicants, the Board's task was to determine if the applicants had established their claim for refugee protection. The onus to do so arose at the time of their applications for refugee protection in 2007 and continued even following the principal applicant, Ms. Aguirre's, debilitating stroke.

[90] The decision and the record reflect that the Board assessed both risks. The Board noted that it considered all the evidence and specifically referred to the PIFs, witness statements to the police, CIC notes, the testimony of the designated representative, Jessica's testimony and the submissions.

[91] As noted by the respondent, the threat from the Mara 18 occurred over 15 years ago, Ms. Aguirre had left Mexico in 2001 and there was no evidence, even before Ms. Aguirre's

stroke, of any subsequent interest in her by the Mara 18 or that this risk continued in any way. The risk from Mr. Gonzalez was not discounted, but the Board reasonably noted that he had returned to Mexico in 2008. Ms. Aguirre's statement to the police in 2008 referred to past threats but there had been no physical violence. The Board accepted the evidence of domestic violence. However, there was no evidence of any further contact by Mr. Gonzalez.

[92] It was not unreasonable for the Board to consider that Ms. Aguirre would be in a medical facility because there was ample evidence before the Board that she was unable to care for herself or her children as she remained in hospital in Canada and her prognosis was very poor. Although I agree that the police are responsible for protecting citizens of violence from other individuals, the fact that Ms. Aguirre would be in a hospital does not place her at much, if any, risk of contact from Mr. Gonzalez. In addition there had not been any evidence of a risk to Jessica from Mr. Gonzalez.

[93] Again, the failure of the applicants to rebut the presumption of adequate state protection was not the determinative finding. If it had been, then the Board would have been expected to conduct a more comprehensive analysis of objective evidence of state protection in Mexico for the applicants.

[94] The determinative finding was the applicants' lack of an objective well-founded fear of persecution from the Mara 18 or from Mr. Gonzalez. The Board found that there was no serious possibility that the applicants would face persecution upon return to Mexico, nor would they be subjected, on a balance of probabilities, to a risk to life or to a risk of cruel and unusual treatment

or punishment by either Mr. Gonzalez or by the Mara 18. The Board considered that the applicants would be in the care of the Mexican authorities in determining that they did not have a well-founded fear. The Board then considered the same factor in the context of considering the adequacy of state protection, as an alternative consideration.

[95] With respect to the applicants' submission that the Board took into account irrelevant considerations in reaching its decision, particularly the possibility of an H&C or spousal application, I do not agree that the Board's references to these options influenced its decision on the determination of the sections 96 and 97 claim.

[96] The transcript reflects that there had been discussions with counsel and the designated representative whether other applications could be made. The Board's references to these discussions do not suggest that this had any bearing on the Board's determination of their claim for refugee protection. The Board was simply noting that other types of applications, including an H&C application, would permit the applicants to raise their personal circumstances and possibly receive a more favourable outcome.

Conclusion

[97] In conclusion, the Board acknowledged the difficult circumstances of the applicants and proceeded to determine their claim in a procedurally fair manner and made reasonable findings which are supported by the evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and
2. No question is proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1-14

STYLE OF CAUSE: AURORA RAFAEL AGUIRRE, JESSICA RASGADO RAFAEL, (A.K.A. JESSICA ISABEL RASGADO RAFAEL) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 17, 2015

JUDGMENT AND REASONS: KANE J.

DATED: MARCH 5, 2015

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